IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1748

KENNETH MALCOLM RIFFE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Kenneth Malcolm Riffe, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case on April 14, 1977, and the petition for rehearing having been denied on May 19, 1977.

OPINION BELOW

The opinion of the Court of Appeals appears at 550 F. 2d 1013 and is reproduced at p. 1a, *infra*. The order denying the petition for rehearing is not reported but appears at p. 4a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition for certiorari was filed less than 30 days after the Court of Appeals entered its final order in the case.

QUESTION PRESENTED

1. Whether the trial court's failure to comply with Rule 11, Fed. R. Crim. P. is error of such a nature that it may be raised for the first time in an appeal from a denial of a Rule 35, Fed. R. Crim. P., motion for correction or reduction of sentence?

RULE INVOLVED

Rule 11, Fed. R. Crim. P., 18 U.S.C. (1975) provides in pertinent part as follows:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> * * *
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
>
> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to

whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

STATEMENT OF THE CASE

The petitioner was convicted, upon his plea of guilty, of delivery of cocaine, a violation of 21 U.S.C.A. § 841 (a)(1) (1972). The proceedings at the petitioner's bench trial were as follows:

MR. BADGER [Assistant United States Attorney]: Next case is Kenneth Malcolm Riffe.

Mr. Riffe, you are advised that you have been indicted by the Grand Jury in Criminal No. 3-76-015, a one count Indictment which reads as follows:

(The Indictment was read by Mr. Badger as filed.)

MR. BADGER: Now, Mr. Riffe, you are advised that the maximum punishment for this offense – this is your first conviction of this nature – includes a fine of up to $25,000.00 and confinement of up to fifteen years or both plus a three-year special parole time that is mandatory if you do receive any period of confinement from the Court.

Now, if you have a prior conviction in violation of the Federal Narcotic Laws and you should be convicted of this charge, the maximum punishment would include a fine of $50,000.00 and confinement up to thirty years or both, and the second would be a six-year mandatory term.

Now, we have your age as being twenty-five, is that correct?

THE DEFENDANT: Yes, sir.

MR. BADGER: Now, because of your age, the Court, if it chooses, may sentence you under the Youth Correction Act. And if this is your first offense and you should be convicted of this offense and the Court chooses to sentence you under the Youth Correction Act, the sentence will be a fifteen-year sentence broken down into two phases – the first phase of which would be an indeterminate sentence of up to fifteen years followed by two years of supervised release. If this is your second conviction in violation of the Federal Narcotic Laws, a sentence under the Youth Correction Act would carry a thirty-year sentence broken down into two phases – the first phase of which would be an indeterminate sentence of up to twenty-eight years followed by two years of supervised release.

Do you understand the statutory maximum sentence and also the sentence under the Youth Correction Act?

THE DEFENDANT: Yes.

MR. BADGER: All right. You are also advised that you have the right to plead guilty or not guilty. If you enter a plea of not guilty, this case will be set for a trial before a jury unless waived by you and your counsel in writing. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Have you had an opportunity to discuss this case with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you hear the U.S. Attorney read the Indictment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you understand it?

THE DEFENDANT: Yes.

THE COURT: You likewise understand the maximum penalty?

THE DEFENDANT: Yes.

THE COURT: You understand the Youth Correction Act?

THE DEFENDANT: Yes.

THE COURT: Do you understand the difference between the statutory penalty and the penalty under the Youth Correction Act?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you likewise understand that you are entitled to a jury if you plead not guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, understanding the charge and understanding the maximum penalty, do you wish to plead guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Do you make that plea freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Has anyone talked you into pleading guilty against your own belief about it?

THE DEFENDANT: No, ma'am.

THE COURT: You make that plea simply because you know yourself to be guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you – has the District Attorney made any promises to you with reference to the sentence?

MR. TRAVIS [Defendant's counsel]: On the plea bargain – excuse me, not with reference to a sentence. I'm sorry. On the plea bargain, there will be no further prosecution on any of the matters known to the Government. That's the only –

THE COURT: I think I should question him about that.

Has the Government promised you that if you plead guilty in this case they won't prosecute you in any other case?

MR. TRAVIS: Well, I don't know that they ever talked to him, but that's what they told me, Your Honor. There is no other case pending on him.

THE COURT: Have they made any promises to you as to what the sentence in this case would be?

THE DEFENDANT: No, Your Honor.

THE COURT: And so far as you know, have they told your attorney what the sentence would be?

THE DEFENDANT: No.

MR. TRAVIS: They have not.

THE COURT: Hold up your right hand.

(Defendant sworn by the Court.)

KENNETH MALCOLM RIFFE,

BY THE COURT:

Q. On or about August the 29, 1975 did you sell to Delphin von Breeson some cocaine?

A. Yes, Your Honor.

Q. And is cocaine a narcotic drug?

A. Yes, Your Honor.

THE COURT: I find you guilty on your plea of guilty and on your admission of the facts, and you will be sentenced on March the 5th at 10:00 o'clock.

MR. TRAVIS: May the Defendant remain on bond under the bond he is on?

MR. BADGER: We have no objection to that, Your Honor.

THE COURT: Yes, he may.

(End of arraignment proceedings).

[App.[1] 44-48.]

An appeal was taken from the conviction. The Court of Appeals affirmed. *United States v. Riffe,* 536 F.2d 1386 (5th Cir. 1976). Thereafter, a Rule 35 motion for reduction or correction of the sentence was filed in the district court. Following a hearing on the motion, the district court denied the motion. The appeal taken from that denial resulted in the decision which is the basis of this petition.

The substantive issue of whether the petitioner's conviction was invalid because of the trial court's failure to comply with Rule 11 was initially stated in petitioner's statement of issues on appeal filed in the trial court after the denial of the Rule 35 motion. The issue was presented and discussed at length in the petitioner's original brief filed in the Court of Appeals. The Court of Appeals held that because the petitioner failed to raise the invalidity of his guilty plea either on direct appeal or in his Rule 35 motion, the issue was not properly before the court.

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals in this case is in direct conflict with the holdings of the Fourth and Ninth Circuit Courts of Appeals, and conflicts with the decision and rationale of *McCarthy v. United States,* 394 U.S. 459 (1969).

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1 "App." refers to the Appendix filed in the Court of Appeals in the petitioner's case.

A reading of the district court's colloquy with the defendant clearly reveals the following deficiencies with regard to fulfilling the requirements of Rule 11:

1. The district court failed to personally admonish the petitioner of the penalty range applicable, a violation of Rule 11(c)(1).

2. The range of punishment stated by the prosecutor, to which the district court alluded, was incorrect to the extent that the maximum punishment was not "fifteen years followed by two years of supervised release." It was fifteen years *including* two years of conditional release. See 18 U.S.C. § 5017(d) (1975).

3. The district court failed to affirmatively advise the petitioner that he could plead not guilty, as required by Rule 11(c)(3).

4. The district court failed to affirmatively advise the petitioner of his right to the assistance of counsel, including the right to appointed counsel, at a trial if he desired a trial, all as required by Rule 11(c)(2) and (3).

5. The district court failed to affirmatively advise the petitioner of his right to confront and cross-examine witnesses against him, as required by Rule 11(c)(3).

6. The district court failed to affirmatively advise the petitioner of his right not to be compelled to incriminate himself, as required by Rule 11(c)(3).

7. The district court failed to affirmatively advise the petitioner that if he plead guilty there would be no further trial, and that by pleading guilty he waived the right to a trial, as required by Rule 11(c)(4).

8. The district court failed to affirmatively advise the petitioner that if he plead guilty, the court may ask him questions about the offense to which he has pleaded, and that the answers to those questions, if given under oath (as they were) could be used against him, as required by Rule 11(c)(5).

9. The district court failed to adequately ascertain that the petitioner's plea of guilty was not the product of "force or threats or promises," as required by Rule 11(d).

The district court's failure to comply with Rule 11 – as enumerated above – brings this case under *McCarthy's* holding. See, *e.g., United States v. Crook,* 526 F.2d 708 (5th Cir. 1976), and *United States v. Narisi,* No. 76-2448, 5th Cir., September 20, 1976.[2] Clearly, there is *McCarthy* error in this case.

The central issue before the Court is not whether *McCarthy* error exists; if it does not, the holding of the court of appeals in this case is not erroneous. What must be decided in this case is whether the court of appeals properly refused to treat the *McCarthy* error on its merits because the error was not raised either on direct appeal or in a post-conviction motion filed in the district court, and whether an additional fact-finding hearing is required to resolve the *McCarthy* issue, as suggested by the court of appeals.

The purposes of Rule 11. In *McCarthy,* this Court noted that Rule 11 had two purposes. First, "the procedure embodied in Rule 11 . . . is designed to assist the district

[2] *Narisi* involved the same district court who presided over the petitioner's trial. The district court accepted Narisi's plea of guilty using virtually the same colloquy as she used at the petitioner's trial. The court of appeals held that the colloquy was insufficient to satisfy the requirements of Rule 11, and reversed Narisi's conviction, citing *McCarthy.*

judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." 394 U.S. at 465. When there is full compliance with the Rule, there exists a complete record of the proceedings which enables expeditious review of the proceedings to ascertain that the accused intentionally relinquished or abandoned those constitutional rights which are necessarily waived when a plea of guilty is entered. 394 U.S. at 465-66.

The nature of the Rule. *McCarthy* requires literal compliance with Rule 11, at least to the extent that the district court must personally address the defendant and must make the substantive inquiries specified by the Rule. 394 U.S. at 467. The nature of the inquiry required by the Rule need not follow any prescribed or ritualistic form. *Id.*, n. 20. Noncompliance with Rule 11 results in an automatic reversal of the conviction and a remand of the cause to allow the "defendant whose plea has been accepted in violation of Rule 11 . . . the opportunity to plead anew." 394 U.S. at 472. The reasons for application of an 'automatic prejudice' rule are: (1) to insure that the defendant is afforded the procedural safeguards inherent in the Rule which govern the voluntariness of his plea; and (2) to insure that the record of the proceedings at the time the plea is entered and accepted are complete and adequate, standing alone, to resolve post-conviction attacks on the guilty pleas. 394 U.S. at 472.

The purposes and nature of Rule 11, as described in *McCarthy*, teach us that compliance with Rule 11 is a fundamental part of the administration of criminal justice in federal courts, just as it is in state courts. See *Boykin*

v. Alabama, 395 U.S. 238, 243-44 (1969). After all, Rule 11 is designed to assure that a defendant's conviction based on a plea of guilty has been obtained consistent with due process, *McCarthy v. United States,* 394 U.S. at 467, which is the bedrock of our judicial system. Because compliance with Rule 11 is so fundamental, allegations of noncompliance with the Rule are a proper subject of post-conviction attacks brought under 28 U.S.C. § 2255. See *Herron v. United States,* 512 F.2d 439 (4th Cir. 1975); *Monroe v. United States,* 463 F.2d 1032 (5th Cir. 1972); *Schworak v. United States,* 419 F.2d 1313 (2nd Cir. 1970); *Lane v. United States,* 373 F.2d 570 (5th Cir. 1967); *Heiden v. United States,* 353 F.2d 53 (9th Cir. 1965). It should also be noted that the Court in *McCarthy* specifically mentioned post-conviction attacks on at least four occasions, 394 U.S. at 465, 466, 467 and 472, thereby acknowledging the conclusion stated above.

Accepting the fact that noncompliance with Rule 11 is a viable issue in post-conviction proceedings under 28 U.S.C. § 2255, it remains to be determined why such an issue may not be raised in a post-conviction proceeding other than that authorized by 28 U.S.C. § 2255. A proceeding in the district court, such as the type authorized by § 2255, is not necessary in this case for fact-finding purposes because the issue of noncompliance with the Rule turns completely on the existing record of the proceedings at which the plea was entered and accepted. The Court in *McCarthy* made this point clearly by stating: "Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding"; and, "[t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." 394 U.S. at 469, 470. Where, as in this case, there is a record of the guilty plea proceedings, the

Rule 11 issue *must* be resolved based on the existing record without resort to additional fact-finding proceedings. *Herron v. United States,* 512 F.2d 439, 441 (4th Cir. 1975); *Heiden v. United States,* 353 F.2d 53, 54-55 (9th Cir. 1965).[3] To the extent that the court of appeals held in this case that "further factual development" in the trial court is required to resolve the *McCarthy* issues, *United States v. Riffe,* 550 F.2d 1013, 1014, the court is in direct conflict with the explicit holdings of the Fourth and Ninth Circuit Courts of Appeal, as well as being in conflict with the expression in *McCarthy* that "further factual development" is unnecessary and inappropriate.

Submission of the *McCarthy* issue to the district court, as required by the holding of the court of appeals, will serve no useful purpose. Whether or not the petitioner is entitled to the benefit of the *McCarthy* holding can and should be determined on the basis of the existing record. If the petitioner is entitled to have his conviction vacated upon the existing record, this Court or the court of appeals can and should afford him that relief. He should

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[3] In *Heiden,* upon which this Court heavily relied in *McCarthy,* the district court's findings of fact made at the hearing on the § 2255 motion were discounted even though they were supported by the § 2255 record:

> There is no question but that the record amply supports the court's findings and supplies basis for disbelief of the appellant. The question is whether such findings can suffice to eliminate prejudice resulting from failure of the court, at the time of arraignment and waiver of counsel, to make the necessary ascertainment of understanding. In our judgment, they do not.

353 F.2d at 54.

not be required to perform the useless function of submitting the issue to the district court because such a requirement will carry with it the obligation to begin serving his sentence which is based on a void conviction. The requirement is therefore extremely oppressive and unjust. If he files a § 2255 motion in the district court and is denied relief, the oppression and injustice will be magnified by virtue of his incarceration upon a void conviction pending appeal from the § 2255 proceedings. (This will also be true if the district court grants relief, but the government appeals.)

CONCLUSION

The relief sought by the petitioner is predicated solely upon application of *McCarthy* as it is presently construed. An extension or modification of *McCarthy's* holding is neither sought nor necessary to a proper resolution of petitioner's claim. The petitioner prays that this Court grant certiorari to insure uniform application of *McCarthy* in all of the federal courts, and to resolve the conflict among the circuits regarding the need for fact-finding hearings to resolve *McCarthy* issues where there is a record of the guilty plea proceedings.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth Malcolm RIFFE,
Defendant-Appellant.

No. 76-4151
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 14, 1977.

The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., denied defendant's motion to reduce sentence, and defendant appealed. The Court of Appeals held that where defendant at hearing on motion not only failed to raise issue of invalidity of his guilty plea but failed to question validity of his conviction on any ground, seeking only to mitigate his sentence, and grounds asserted for mitigation did not suggest invalidity of plea, question whether guilty plea was invalid was not properly before the court on appeal.

Affirmed.

Criminal Law ⇐ 1043(3)

Where at hearing on motion to reduce sentence defendant not only failed to raise issue of invalidity of his guilty plea but failed to question validity of his conviction on

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

any ground, seeking only to mitigate his sentence, and grounds asserted for mitigation did not suggest invalidity of plea, question whether defendant's guilty plea was invalid was not properly before Court of Appeals and it refused to find fault with trial court's ruling denying motion on basis which was never presented and upon which trial court had no reason to require further factual development. Fed. Rules Crim. Proc. rules 11, 35, 18 U.S.C.A.; 28 U.S.C.A. § 2255.

Appeal from the United St ates District Court for the Northern District of Texas.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Kenneth Riffe appeals the denial of a motion to reduce his sentence pursuant to Rule 35, F.R. Crim. P. He was convicted upon a plea of guilty to delivering cocaine in violation of 21 U.S.C. § 841(a)(1), and this court affirmed. *See United States v. Riffe,* 536 F.2d 1386 (5th Cir. 1976) (R. 21). Neither on direct appeal nor in the district court on his Rule 35 motion did appellant raise the issue of the invalidity of his guilty plea. He now asserts that the trial court failed correctly to perform its Rule 11 functions and that he was erroneously informed of a maximum penalty for the charged crime that in fact exceeded the statutory maximum.

At the hearing below on his Rule 35 motion, appellant not only failed to raise these issues, but he failed to question the validity of his conviction on any ground, seeking only to mitigate his sentence. Moreover, the grounds asserted for mitigation did not suggest the invalidity of the

plea. Although under some circumstances a Rule 35 motion to reduce sentence will be construed as a motion to vacate sentence pursuant to 28 U.S.C. § 2255, appellant did not seek such an interpretation.

The question whether the guilty plea was invalid is hence not properly before this court, and we decline to pass on this matter. We refuse to find fault with the trial court's ruling on the Rule 35 motion on a basis never presented to it, and upon which that court had no reason to require further factual development. No such exceptional circumstances exist in the case at bar that would warrant departing from this principle in order to avoid a miscarriage of justice. *See United States v. Grene,* 455 F.2d 376, 378 (5th Cir.), *cert. denied,* 409 U.S. 856, 93 S. Ct. 136, 34 L.Ed. 2d 101 (1972); *United States v. Hall,* 440 F.2d 1277, 1278 (5th Cir. 1971); *United States v. Hunter,* 417 F.2d 296, 297 (6th Cir. 1969); *Potter v. United States,* 304 F. 2d 664, 666 (8th Cir. 1962).[1] Appellant is free to use other procedural devices to attack his conviction, though we intimate no conclusions regarding the merits of his claim. The judgment of the district court is

AFFIRMED.

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[1] *Cf. United States v. Resnick,* 483 F.2d 354, 358 (5th Cir.) *cert. denied,* 414 U.S. 1008, 94 S. Ct. 370, 38 L.Ed. 2d 246 (1973) (question raising for first time on appeal the possibility of unconstitutional sentence was required to be passed on first by trial court pursuant to Rule 35).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA. 70130

May 19, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-4151 – USA v. Kenneth Malcolm Riffe

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Melvyn Carson Bruder
Ms. Judith A. Shepherd